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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OWENS-ILLINOIS, INC., et al.,

Petitioners,

—v.—

BRUCE E. DANFIELD, et ux.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Petitioners, former manufacturers of various products containing asbestos, are defendants in tens of thousands of failure-to-warn product liability cases. Petitioners seek to introduce evidence proving their lack of actual or constructive knowledge of potential hazards of their particular products, evidence which may be introduced by all other manufacturers of all other products.

The questions presented are:

1. Is the preclusion of petitioners' evidence, based upon judicial determinations in prior cases involving neither petitioners nor any of their products, a violation of petitioners' rights to due process of law in conflict with collateral estoppel principles enunciated by this Court (a question on which the courts of appeals are in disagreement)?

2. Is the preclusion of petitioners' evidence, while allowing such evidence by all manufacturers of all other products, a violation of petitioners' rights to equal protection of the laws?

3. Is the adoption by a federal court (in its diversity jurisdiction) of "facts," which it determines were *sub silentio* judicially noticed by a state court, permitted where neither the state or federal court has applied the requirements of Fed. R. Evid. 201 (judicial notice)?

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENTS

In the consolidated proceedings below, the parties to *In re Asbestos Litigation* [*Danfield, et al. v. Johns-Manville Sales Corp., etc., No. 86-5237*] included petitioners Owens-Illinois, Inc., Keene Corporation, Pittsburgh Corning Corporation, The Celotex Corporation, Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation and Fibreboard Corporation and respondents Bruce E. Danfield and Arlene F. Danfield, his wife. The information required by Rule 28.1 with respect to the above corporate petitioners is set forth in the Appendix at 3a to 4a.

Petitioner Raymark Industries, Inc., separately represented but joining in this petition, was the sole party to *In re Asbestos Litigation* [*Raymark Industries, Inc., Appellant in No. 86-5236*]. This petitioner's Rule 28.1 information appears in the Appendix at 4a.

The parties to *In re Asbestos Litigation* [*John W. Gregory, et al. v. General Motors Corporation, No. 86-5370*] were: John W. Gregory and Zelda F. Gregory, his wife; Zelda F. Gregory as Administratrix and Administratrix Ad Prosequendum of the Estate of John W. Gregory, Deceased; Zelda F. Gregory, Individually; and Brian Gregory, a minor, by his natural parent and guardian Zelda F.Gregory.

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Petitioners Owens-Illinois, Inc., Keene Corporation, Pittsburgh Corning Corporation, The Celotex Corporation, Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation and Fibreboard Corporation, and petitioner Raymark Industries, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 22, 1987.

OPINIONS BELOW

The lead, concurring and dissenting opinions of the United States Court of Appeals for the Third Circuit are reported at 829 F.2d 1233, and appear in slip opinion form in the Appendix

hereto at 13a to 78a.[1] Orders dated September 28, 1987 and October 8, 1987 amending the lead opinion appear at App. 79a to 80a and App. 81a to 83a.

The eight-to-six *in banc* opinion of the United States District Court for the District of New Jersey is reported at 628 F.Supp. 774, and is reprinted in the Appendix hereto at 90a to 110a.[2]

JURISDICTION

These product liability cases were filed in the district court by various plaintiffs, jurisdiction based on 28 U.S.C. § 1332 (1982). On February 14, 1986, the United States District Court for the District of New Jersey issued its opinion and order denying petitioners' constitutional challenges to a series of New Jersey Supreme Court common-law decisions and certifying controlling questions of law for appeal pursuant to 28 U.S.C. § 1292(b) (Supp. III 1986). 628 F. Supp. 774, 784 (D.N.J. 1986). App. 108a to 110a. By orders dated March 26, 1986 and May 13, 1986, the Third Circuit Court of Appeals granted permission to appeal. App. 84a to 85a, 86a to 87a, and 88a to 89a. The Third Circuit filed its opinion on September 22, 1987 (App. 13a to 83a) and denied rehearing and rehearing *in banc* on November 2, 1987. App. 11a to 12a. By orders dated November 18, 1987, November 30, 1987 and February 5, 1988 the court of appeals stayed issuance of its certified judgment in lieu of formal mandate until March 2, 1988. App. 7a, 8a, 9a, and 10a. By order dated December 28, 1987, Justice White extended petitioners Owens-Illinois, Inc., *et al.*'s time for filing this petition for a writ of certiorari to and including March 2, 1988. App. 5a.

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1 Hereinafter citations to the Appendix will be stated as: App. ____a.

2 With the exception of the Third Circuit slip opinions, all cases included in the Appendix were reprinted from opinions published in volumes of the official reporter system. For the convenience of the reader, page references to the West Publishing Co. reporter system appear in bold brackets as follows: [ ].

By order dated January 21, 1988 Justice Brennan granted petitioner Raymark Industries, Inc. a similar extension. App. 6a.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment V and United States Constitution, amendment XIV, § 1 are reprinted in the Appendix at 1a.

STATUTE INVOLVED

Federal Rule of Evidence 201 is reprinted in the Appendix at 2a.

STATEMENT OF THE CASE

In several product liability diversity cases pending in the District of New Jersey, petitioners, including Owens-Illinois, Inc. [hereinafter "O-I"], sought to prove that their asbestos-containing products (many sold 30 or 40 years earlier) were not "defective".[3] Petitioners requested pretrial rulings to permit the introduction of evidence that, at the time of sale, they had neither actual nor constructive knowledge of the potential hazards of their particular products under foreseeable use, and

3 Like many other states, New Jersey generally follows the Restatement (Second) of Torts § 402A (1965), which imposes liability upon manufacturers of "defective" products. A product is defective if sold without a warning of hazards of which the manufacturer knew or should have known. *Id.*, comment j.

thus no duty to warn existed.[4] The admissibility of such "state-of-the-art" evidence was at issue in the district court because

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4 In the present case, for example, O-I made an offer of proof which included the following facts:

(a) From about 1948 until May, 1958, O-I engaged in the commercial manufacture and sale of Kaylo, a useful hydrous calcium silicate pipe and block insulation which contained only about 15% asbestos; after May, 1958, O-I never made or sold any insulation building products.

(b) O-I had Kaylo independently tested to see if it constituted an unexpected, potential health hazard. O-I was advised, as a result of such testing, that it should observe existing, widely-accepted dust standards at its manufacturing plants, but was not advised that the use of the product posed any potential health hazard to insulators or shipyard workers. During the more than 10 years that O-I manufactured Kaylo, O-I monitored the health of its plant employees; at no time was there any evidence of any x-ray changes indicating an asbestos-related disease; nor were there any employees' compensation claims arising out of a condition alleged to be related to asbestos; nor were there any excess absences from work due to pulmonary conditions related to asbestos.

(c) In 1946 a reputable industrial hygiene journal published an epidemiological study conducted by well-regarded authorities, which concluded that insulators were not engaged in a dangerous occupation. O-I, in fact, relied upon that article and its findings.

(d) From 1946 through 1964, and after, all studies of shipyard workers and other insulators indicated that those workers were not exposed to conditions in excess of the recognized "threshold limit values" (safety standards developed by governmental hygienists and adopted by many states) according to all published and available sources. No criticism of the threshold limit value was voiced in the scientific community until 1964, and the standard was not changed until 1968.

(e) Thus, up to and including May, 1958, when it ceased the business of making and selling insulation products, O-I did not know that the foreseeable use of its particular products by insulators could result in a potential health hazard to them; nor, based upon the information reasonably available or obtainable at the time, should or could O-I have known that insulators using its products

prior New Jersey Supreme Court rulings in unrelated cases (none involving a trial to which petitioners were parties) denied the defense (without an articulated reason) to asbestos product manufacturers, but permitted it for all other manufacturers of all other products. As to that adverse classification, petitioners asserted rights based upon the equal protection clause of the fourteenth amendment.

In response, in an extraordinary procedure and on its own motion, the federal district court consolidated 133 asbestos-related cases, involving hundreds of individual plaintiffs and dozens of different manufacturers and products made and used at different times and under different conditions, for the limited purpose of a common adjudication of petitioners' pretrial motions and equal protection claims. The district court's October 11, 1985 order of consolidation appears at App. 111a.

On February 14, 1986, in the face of a dissent by then Chief Judge Fisher, joined in by five other district judges, a bare majority of eight district judges assumed, without factual predicate, that the purpose (albeit unarticulated) of the New Jersey Supreme Court's discriminatory classification was to ease jury confusion and to expedite trial of the issues. *In re Asbestos Litigation*, 628 F. Supp. 774, 779 (D.N.J. 1986). The district court found the classification rationally related to that purpose because it eased the jury's burden by "removing voluminous and often conflicting testimony concerning the knowledge possessed by the industry as a whole, and by each individual defendant in particular, on a myriad of different, remote dates," *id.*, and thus would expedite the trial of hundreds of asbestos cases filed

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were exposed to a potential health hazard. Accordingly, O-I had no reasonable basis to issue warnings in connection with the use of its products.

The proffered facts, if accepted by the jury, constitute a defense available to O-I and would support a verdict in its favor. However, under New Jersey Supreme Court rulings, these facts would not be admissible in evidence because this case involves an asbestos-containing insulation product. Had Kaylo been a fiberglass or other asbestos-free insulation product, the evidence would be admissible. See *infra* pp. 7-8.

in New Jersey. The district judges, on their own motion, made the requisite findings and certifications pursuant to 28 U.S.C. § 1292(b), 628 F. Supp. at 784, and an appeal was taken to the Third Circuit.

On September 22, 1987, the Third Circuit ruled in a 1-1-1 opinion that the disparate treatment of asbestos defendants did not violate the fourteenth amendment. The decision reflected such great discord that no two judges could agree on an opinion:

> —Judge Weis's lead opinion relied generally on the grounds advanced by the district court majority, despite an intervening New Jersey Supreme Court decision which completely undercut the rationale of the district court. Judge Weis found the New Jersey Supreme Court's rulings "weak and ill-advised" but "not completely divorced from reality" and hence, not "irrational".
>
> —Judge Becker concurred in the result but rejected the grounds relied on by Judge Weis,[5] resting instead on a theory of judicial notice of "legislative facts," a theory never advanced by any party or court. Judge Weis appears to accept the "judicial notice of legislative fact" proposition which the dissent characterizes as "unprecedented", "misguided" and constitutionally defective. Curiously, the significant "legislative facts" which the New Jersey Supreme Court allegedly "judicially noticed" was evidence presented not by petitioners but by Johns-Manville, in a case involving none of the petitioners and decided two years *after* the adverse classification of asbestos manufacturers had been established.
>
> —Judge Hunter, in a vigorous dissent, determined that the New Jersey Supreme Court had established a law which

5 Because of this disagreement, Judge Becker's concurrence actually formed the basis of the court of appeals' affirmance of the 8-6 district court opinion.

was not only unconstitutional but "unprincipled," "ineffective," "pernicious," "undeniably arbitrary," and "just plain wrong."

On November 2, 1987, with only seven of eleven circuit judges voting (including Judges Weis and Becker), the Third Circuit voted 6-1 to deny rehearing *in banc*.[6]

The state law background for these federal constitutional questions consists of a series of bizarre New Jersey Supreme Court product liability cases.

In 1982 the New Jersey Supreme Court eliminated the state-of-the-art defense in *all* strict products liability cases. *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). (Reprinted in the Appendix at 147a to 167a. The *Beshada* decision was rendered as a matter of law on a motion *on the pleadings*, without giving any of the defendants any opportunity to offer any proofs whatsoever. The decision cited a Texas federal court opinion,[7] but rested largely on grounds of administrative convenience: the need to eliminate potential jury confusion and extended trials caused by introduction of evidence of "scientific knowability."

Two years later, however, in *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984), a prescription drug case to which none of the petitioners were parties, the same court abandoned the rationale of *Beshada*, and held that actual and

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6 At this point, seventeen federal judges have written or joined opinions in this case. Six district judges and one circuit judge have found for petitioners; eight district judges and two circuit judges have found against petitioners, but on the case-dispositive issue the two circuit judges are in disagreement with each other and with the eight district judges. This difference of opinion, in and of itself, suggests the need for review by this Court to clarify the law.

7 *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981). This case was later reversed. 681 F.2d 334 (5th Cir. 1982). The Fifth Circuit's opinion is reprinted in the Appendix at App. 112a to 146a.

constructive knowledge *are* relevant factors in determining liability in warning cases and defendants were authorized to introduce evidence on that issue. 97 N.J. at 452-55, 479 A.2d at 386-88. The court, however, declined to overrule *Beshada* and ambiguously restricted that decision to "the circumstances giving rise to its holding." 97 N.J. at 455, 479 A.2d at 388. (*Feldman* is reprinted in the Appendix at 168a to 198a).

Based on *Feldman*, petitioners, including O-I, sought to introduce in state court defendant-specific state-of-the-art evidence.[8] The state trial court, and ultimately the New Jersey Supreme Court, denied the application and, without suggesting *any* reason for the distinction, ruled that *Beshada* applied to "asbestos cases" and *Feldman* to all other strict products liability cases. *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984). (Reprinted in the Appendix at 199a).

After publication of the district court's decision in the present case, but before the Third Circuit's ruling, the New Jersey Supreme Court decided *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986) (another case to which none of the present petitioners was a party). (Reprinted in the Appendix at 200a to 241a). Unlike most of the cases involving peti-

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8 The state-of-the-art defense is not so simple as the Third Circuit's lead and concurring opinions and the New Jersey Supreme Court suggest. In the 1930's it was widely acknowledged that inhalation of respirable asbestos fibers, in significant concentrations over extended periods of time, could cause a lung disease called asbestosis. No defendant contests that fact. Petitioners, however, seek to introduce evidence that, at the time of sale of their particular products (which contained only a small percentage of asbestos or which, under foreseeable use, did not involve the inhalation of significant concentrations of asbestos over extended periods of time) they did not know—either actually or constructively—of the hazards of those relatively low-level exposures which later scientific discovery revealed. In New Jersey, however, no defendant manufacturer of any product containing asbestos (hair dryers, floor tile, automobile brakes) is allowed to offer such evidence, although manufacturers of all other products are (including manufacturers of hair dryers, floor tile and automobile brakes which may cause harm but which do not contain asbestos!).

tioners, in which exposure occurred to a wide variety of finished products, generally under conditions approved and promulgated by state and federal authorities, *Fischer* involved exposure by the plaintiff in a plant setting to unregulated amounts of raw asbestos fiber supplied by Johns-Manville [hereinafter "J-M"]. On the appeal of a punitive damages award rendered in a strict liability trial, the New Jersey Supreme Court totally abandoned its earlier reasoning in *Beshada*, and declared its "faith" that jurors would be able to evaluate the plaintiff's strict liability claim (as to which defendants' knowledge and conduct are irrelevant and inadmissible) and at the same time, on punitive issues, evaluate the knowledge and conduct evidence, *Fischer*, 103 N.J. at 659, 512 A.2d at 474-75, which in *Beshada* it called "complicated, costly, confusing and time-consuming." *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 207, 447 A.2d 539, 548 (1982).

The absence of internal or logical consistency in these state court cases as applied to petitioners creates an irrational classification, an infirmity of constitutional consequences. The manner in which the court of appeals sought to rescue the classification violates petitioners' due process rights.

REASONS FOR GRANTING THE WRIT

I.

THE OPINIONS OF THE THIRD CIRCUIT, PRECLUDING EVIDENCE ON DISPOSITIVE ISSUES IN PRODUCT LIABILITY CASES, CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT AND CONFLICT DIRECTLY WITH A DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS.

Even members of the "asbestos industry"[9] are entitled to fundamental fairness from the judicial system in defending the sixty or seventy thousand claims—many meritorious, many not—pending against them.[10] The result below is fundamentally unfair. Petitioners were foreclosed from presenting a widely-accepted, fact-sensitive, case-dispositive defense in thousands of lawsuits governed by New Jersey law before enjoying the

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9 A misleading judicial characterization of diverse companies: *e.g.*, automobile manufacturers (which sold cars with asbestos brake linings), glove manufacturers (which sold thermal gloves with asbestos), conveyor belt manufacturers (which sold some high temperature belts with asbestos), boiler manufacturers (which sold some boilers pre-insulated with asbestos-containing covering).

10 Petitioners are acutely aware that the asbestos litigation is unique in scope and size. Appellate courts, including the court below, regularly comment upon the issue. *In re Asbestos Litigation*, 829 F.2d 1233, 1235 (3d Cir. 1987) ("[A] serious problem for American tort law. . . . [T]he pressing demands of this massive litigation. . . ."). Petitioners do not resist innovative approaches to the litigation; indeed, petitioners are all members of the Asbestos Claims Facility [hereinafter "ACF"], established in 1985 to handle and resolve asbestos-related personal injury claims. *See* T. Willgang, Trends in Asbestos Litigation at xii-xiii, 22 (Federal Judicial Center 1987). Since its inception, the ACF has settled or disposed of 18,000 cases. 3 Mealey's Litigation Reports: Asbestos, Issue 1 at 4-5 (Feb. 12, 1988). But petitioners believe that constitutional rights—the right to a day in court and the right to be treated equally—cannot be subordinated to docket management and calendar control considerations. Due process may be inconvenient for courts dealing with "asbestos litigation" but the fourteenth amendment applies to mass tort cases no less than to other cases.

benefits of even one jury trial on that defense.[11] The court below improperly ignored the opinions of this Court and of the Fifth Circuit in denying petitioners' due process rights.

This Court has placed strict constitutional limits on issue preclusion. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). Those limits, blatantly disregarded below, prohibit issue preclusion by way of collateral estoppel (or presumably its functional equivalent—"judicial notice of legislative facts") unless the precluded party previously had a full and fair opportunity to litigate the issue and a factual determination against that party had been made. No such prior determination occurred in this case. Instead, the prior trial court ruling invoked by the Third Circuit to support issue preclusion was reversed on appeal, *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982) and the "facts" determined by the panel actually were rejected by a jury in one of the cases *sub judice*.[12]

The result below specifically conflicts with this Court's collateral estoppel-due process analysis in *Blonder-Tongue*, *Parklane* and *Kremer*. The court of appeals has adopted a state court ruling preventing petitioners from litigating their particular state-of-the-art defenses. But there never has been a verdict or trial judgment in any case applying New Jersey law to which petitioners were a party which rejected that defense. Before the defense was precluded, petitioners never had their day in court

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11 After the state court's ruling one of the petitioners was, in a New Jersey federal case, able to present this evidence, resulting in a defense verdict. See discussion of *Conley v. Johns-Manville Sales Corp.*, No. 80-2481 (D.N.J. complaint filed Aug. 28, 1980) *infra* p. 17.

12 See *id.*

on that issue, and "never had a chance to present their evidence. . .".[13] *Blonder-Tongue*, 402 U.S. at 329.

There is no way to square the result below with this Court's due process "fairness" limits on the use of issue preclusion. If it is unconstitutionally unfair to bind a party by results in another case involving similar circumstances to which it was not a party, it is equally unconstitutionally unfair to bind it by results in another case involving *dissimilar* circumstances to which it was not a party.

The potential unfairness of offensive collateral estoppel pales before the gross unfairness of "judicial notice of legislative facts," the device utilized by the Third Circuit to find rationality in the challenged state court classification. Imagine that, based on a jury determination in a case against Ford Motor Company that Ford Mustangs have faulty brakes, a state court barred Ford in later cases from introducing evidence that Mustang brakes were not defective. Thereafter, could a federal court foreclose a defendant driver involved in an auto accident case in federal court from introducing evidence that, in the specific case, his brakes were not defective and that he was not at fault? There, as well as here, the preclusion of evidence at variance with the judicially noticed "fact" would be a denial of due process.

Not only do the lead and concurring opinions of the court of appeals violate the rulings of this Court in *Blonder-Tongue* and *Parklane*, they conflict directly with *Hardy*, 681 F.2d 334 (5th Cir. 1982). To appreciate the remarkable congruence of this case and *Hardy*, it is necessary to review the sequence of "asbestos law" in Texas and New Jersey.[14]

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13 Constitutional limitations apply more forcefully to the present case because offensive collateral estoppel (and, *a fortiori*, "judicial notice of legislative facts") "does not promote judicial economy. . ." *Parklane*, 439 U.S. at 329.

14 For product liability cases generally, both states follow the Restatement (Second) of Torts § 402A (1965). *See supra* n.3.

In Texas in 1973, certain manufacturers of asbestos-containing insulation products were found strictly liable for personal injuries sustained by a plaintiff-insulator. The result was affirmed on appeal, the court finding sufficient evidence to support the jury verdict that the products were defective and unreasonably dangerous because they lacked warnings of hazards of which the defendants knew or should have known. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

Thereafter, in subsequent litigation in Texas in 1981 involving similar plaintiffs, some of the same defendant-manufacturers, and some of the very same products involved in *Borel*, a trial court used principles of collateral estoppel and judicial notice to preclude all the defendants from re-litigating the issue of their actual or constructive knowledge. *Hardy v. Johns-Manville Sales Corp.*, 509 F.Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982). That result was reversed on appeal, the court of appeals applying *Blonder-Tongue* and *Parklane*, and holding that the use of collateral estoppel violated the constitutional due process rights of all defendants. *Hardy*, 681 F.2d at 338. The Fifth Circuit also noted what had *not* been decided in *Borel*:

> 'Our opinion in *Borel* . . . did not resolve that as a matter of fact all manufacturers of asbestos-containing insulation products had a duty to warn as of 1936 . . . . [T]his Court certainly did not decide that every jury presented with the same facts would be compelled to reach the conclusion reached by the *Borel* jury: that asbestos was unreasonably dangerous. Such a holding would . . . have been unwarranted . . . .
>
> [*Borel*] did not determine as a matter of fact that . . . all products containing asbestos—in whatever quantity or however encapsulated—are hazardous.'

681 F.2d at 345, 347.

Thus, after *Hardy*, the defendant-manufacturers in Texas were free to introduce exculpatory evidence that their products were not defective because at the time of sale the defendants did not know and could not have known of the hazards posed by those particular products.

Meanwhile, however, in New Jersey the state supreme court in 1982 determined that many of the same defendants in *Hardy*, (as well as all manufacturers of all other products) were barred from introducing such evidence and presenting the state-of-the-art defense. The New Jersey court did this as a matter of law, on motions addressed to the pleadings, without any trial, and in apparent reliance on *Borel* and the *Hardy trial court* opinion. *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). That result was followed in New Jersey and, although in 1984 the state-of-the-art defense was reinstated for all manufacturers of all products *not* containing asbestos, *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984) (a prescription drug case), the New Jersey Supreme Court later that year reaffirmed, without explanation, the differential adverse treatment of asbestos product manufacturers. *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984).

By that date, there still had been no jury verdict or final judgment in any "asbestos case" in New Jersey in which the state-of-the-art defense had been presented; moreover, the *Hardy* trial court opinion which foreclosed the defense based upon *Borel* had been reversed. *Hardy*, 681 F.2d 334. With that background, in 1986, the district court in the present cases barred the defense and precluded the evidence. 628 F.Supp. 774. The court of appeals affirmed, relying upon judicial notice of "legislative facts" which it derived from *Beshada*, *Feldman* and *Fischer v. Johns-Manville*, 103 N.J. 643, 512 A.2d 466 (1986) (another New Jersey Supreme Court asbestos case, decided after the district court opinion below, involving none of the petitioners and none of their products).

The conflict between the Third and Fifth Circuits is a direct one; the results cannot be reconciled. As a consequence of the Fifth Circuit's reading of the due process clause, manufacturers of asbestos-containing products in Texas may not be precluded from introducing evidence as to their actual and constructive knowledge at the time they sold the products in question; as a consequence of the Third Circuit's reading of the due process clause, the very same defendants (and others, including manufacturers of products such as automotive brakes, hair dryers and floor tile) are precluded from introducing such evidence in New Jersey.

Tort law, including products liability law, is an area generally left to state legislation or common law, but even the court of appeals recognized an obligation to measure that tort law against the federal standards uniformly established by the Constitution. *In re Asbestos Litigation*, 829 F.2d. at 1240 (Weis, J.), and at 1252 (Becker, J. concurring).

Fundamental fairness rising to constitutional dimensions, particularly when this Court has spoken so clearly, cannot be permitted to be different from circuit to circuit. In the Fifth Circuit, some of these defendants never had an opportunity to fully and fairly litigate issues in a prior action relating to their actual or constructive knowledge of potential hazards of their particular products under various circumstances of use; thus, they could not be issue-precluded in a subsequent litigation. In the Third Circuit, the same defendants were in precisely the same position, but issue preclusion was sanctioned. The fourteenth amendment is the same in the Fifth Circuit as it is in the Third Circuit. The right to a full and fair adjudication, a day in court, ought to be the same in both places. Presently it is not, a consequence which may lead to great uncertainty in the other circuits which have many pending asbestos cases. The guidance of this Court is required to resolve the conflict, not to preempt innovative judicial techniques dealing with calendar problems posed by the asbestos litigation, but to remind all courts that those techniques must accord with the fundamental values expressed in the Constitution.

Moreover, the guidance of this Court is needed to restrain the novel "legislative fact" theory used below. There have been many determinations that petitioners did *not* have actual *or constructive* knowledge of the hazards posed by their particular products under various conditions of foreseeable use. Such contrary judicial determinations not only prevent the use of offensive collateral estoppel, *see Parklane*, 439 U.S. 322, but also confound the "legislative fact" analysis. It is indisputable that juries in Texas, in New Jersey[15] and elsewhere have determined on the very evidence proffered by petitioners in the district court that the particularized state-of-the-art defense is valid and effective. Judge Becker, in concurrence, concluded that "the New Jersey Supreme Court, via the *Beshada-Feldman-Fischer* trilogy, has determined a legislative fact—namely that, at all relevant times, asbestosis harms were knowable to the industry." 829 F.2d at 1245. App. 38a.[16] Judge Becker's approach, quite unusual in appellate matters, was never raised by any counsel or any of the fourteen district judges below, and was neither briefed nor argued on appeal. Even more surprisingly, Judge Becker cited to the *Hardy v. Johns-Manville Sales Corp.* trial court opinion for the proposition that the harms were knowable to the industry as a whole and thus, evidence of these defendants' knowledge may be precluded, a proposition rejected in the *Hardy* Fifth Circuit opinion. *Compare In re Asbestos Litigation*, 829 F.2d at 1246, 1247 (Becker, J., concurring) (App. 40a to 42a) *with Hardy*, 681 F.2d at 345. (App. 132a to 133a). But, in *no* case cited by Judge Becker was the actual *or constructive* knowledge of certain of the present defendants, at the time they manufactured their particular products, determined by any jury.

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15 See discussion of *Conley v. Johns-Manville Sales Corp.*, *infra* p. 17.

16 Of course, *Beshada* was a case decided solely on the pleadings, *Feldman* was a drug case and *Fischer* was a plantworker case against Johns-Manville only.

The court of appeals' use of the "legislative fact" theory is disturbing for three reasons: (1) it unfairly prejudices the petitioners; (2) the New Jersey Supreme Court gave no indication whatsoever to any litigant at any time that any facts were being judicially noticed; and (3) it is incorrect. Petitioners can and will establish that at least as to some products and under some circumstances they did not know and reasonably could not have known of the risks which later knowledge has shown to exist.[17]

As a compelling example, during the pendency of the appeal below, an "asbestos" plaintiff in one of the cases *sub judice* proceeded to trial on strict liability, negligence and punitive damages theories in the district court against some of the present petitioners, affording them the opportunity of presenting the state-of-the-art defense. *Conley v. Johns-Manville Sales Corp.*, No. 80-2841 (D.N.J. complaint filed Aug. 28, 1980). Plaintiff's claims, as in all such cases, were based upon defendants' manufacture of "defective" products (*i.e.*, not bearing a warning). State-of-the-art evidence was presented. The trial judge charged "constructive knowledge" and the jury specifically found, in answers to interrogatories, that one defendant's asbestos-containing products were not defective nor unreasonably dangerous because they lacked a warning. App. 242a to 244a. In so doing, the jury found the *fact* that, under the circumstances of that case and the products involved, the defendant did not know and reasonably could not have known of the potential hazards of its asbestos-containing products.[18]

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17 Even today, some 30 years after at least one of the petitioners stopped selling its product, the use of asbestos is not banned, *See, e.g.*, 40 C.F.R. Pt. 763 (1986), and low-level exposures are expressly permitted by federal law. *See, e.g.*, Asbestos Hazard Emergency Response Act, 15 U.S.C. §§ 2641-2654 (Supp. IV 1987).

18 Petitioners certainly do not cite this unreported case as support for any legal propositions determined therein, but merely to show that what is "fact" to the court of appeals and perhaps to the New Jersey Supreme Court, is not "fact" to jurors who—unlike the New Jersey Supreme Court and the courts below—actually heard evidence about petitioners' products instead of Johns-Manville's raw asbestos fiber.

Such a finding is not unusual. *See, e.g., Anderson v. Owens-Illinois*, 799 F.2d 1 (1st Cir. 1986) (upholding jury verdict for defendants based upon state-of-the-art defense); *Starnes v. Johns-Manville Corp.*, No. 2075-122 (E.D. Tenn. 1977) (cited in *Hardy*, 681 F.2d at 346).

These inconsistent results and determinations of fact render any application of offensive collateral estoppel unconstitutionally unfair, and they should have the same effect upon judicially-noticed "legislative facts" which are repeatedly shown to be false.

In summary, the court of appeals could not find in the New Jersey Supreme Court opinions any articulated rational basis for the adverse classification of asbestos product manufacturers. In the process of inventing a rational basis by fashioning a Draconian theory of judicial notice of legislative facts, the court of appeals committed a profound violation of petitioners' due process rights. Petitioners never had a day in court (except in *Conley*, discussed *supra* p. 17, which they won)—either to present their state-of-the-art defense or to dispute the propriety of judicial notice. Petitioners are at least entitled to a day in court; due process requires as much. A writ should issue to permit this Court to consider the question, to enforce its rulings in *Blonder-Tongue* and *Parklane*, and to resolve the inter-circuit conflict.

II

THE THIRD CIRCUIT'S OPINIONS UNCONSTITUTIONALLY DISCRIMINATE AGAINST CIVIL LITIGANTS IN THOUSANDS OF CASES INVOLVING HUNDREDS OF MILLIONS OF DOLLARS.

While this Court undoubtedly is inundated with petitions asserting fourteenth amendment equal protection claims, this is an exceptional case. It is not often that a state court creates an unjustified—and unjustifiable—common law rule which unconstitutionally discriminates against one category of civil liti-

gants. It is equally rare that the provisions of the United States Constitution require federal review of state court judicial workmanship. However, it is most extraordinary that a decision of a court of appeals, by misinterpreting and misapplying well-settled legal principles of judicial notice and legislative fact-finding, compounds and intensifies the constitutional infirmities of a state court rule.

Judge Hunter described the classification created by the post-*Beshada* cases as "nothing more than an unprincipled, expedient, and ineffective response to widespread criticism of the *Beshada* doctrine combined with an unwillingness to give up the application of *Beshada* to asbestos manufacturers". *In re Asbestos Litigation*, 829 F.2d 1233, 1254 (3d Cir. 1987) (Hunter, J., dissenting). App. 59a. He viewed it as, at least, "undeniably arbitrary" and at worst, as having been designed solely "to inflict a special punishment on asbestos manufacturers." *Id.* App. 59a. Whether or not this Court, upon review, agrees with the dissent that the challenged classification is "pernicious," *id.* at 1258 (App. 68a), it should agree that it is "just plain wrong." *Id.* at 1252. App. 55a.

Announcing a rule that significantly affects thousands of litigants in state and federal cases governed by New Jersey law, and asserted liabilities of hundreds of millions of dollars, the New Jersey Supreme Court refused to articulate any reason for imposing hyper-strict liability on manufacturers of one type of insulation but not others. Nor can any rational basis for this disparate treatment be posited.[19] Asserting that failure to articulate a basis does not necessarily render a classification invalid if data exists to justify the distinction, 628 F.Supp. at 778, the

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19 The aberrational state of tort law in New Jersey now is as follows: Manufacturer A sells hair dryers with asbestos insulating panels; Manufacturer B sells hair dryers without asbestos but with space-age plastic nozzles. After thirty years of use, it is alleged that both products cause latent diseases. B is allowed to use the state-of-the-art defense, showing it did not know and could not have known of any danger at the time of sale; but A—even though it has never had a trial on the issue—is not allowed to use the defense.

federal district court hypothesized a possible purpose behind the *Beshada/Feldman* distinction: simplification of the fact-finding process in a multiple party case in order to "ease jury confusion and resulting prejudice to litigants, and to expedite trial of the issues." *Id.* at 779. Absent further expression on the subject by the New Jersey Supreme Court, this hypothesis might have provided the Third Circuit a sufficient basis to affirm without straining to invent new legal theories which trample the constitutional protections so carefully enunciated by this Court in *Blonder-Tongue* and *Parklane*. See *supra* Point I. But, in deciding *Fischer*[20] as it did, the New Jersey court totally eliminated the "rational" basis ascribed by the district court to its *Beshada/Feldman* decisions.

Notwithstanding the fact that the underpinning of the district court's opinion had been destroyed by *Fischer*, a problem which Judge Weis himself recognized, the lead opinion upheld the classification (although conceding it was "weak and ill-advised") generally on the same administrative convenience grounds as did the district court—as though *Fischer* had never been decided. *In re Asbestos Litigation*, 829 F.2d 1233, 1238-44. App. 13a, 23a to 37a.

Even if administrative convenience is a "legitimate" purpose, a proposition rejected by the six dissenting district judges and Judge Hunter (and even questioned by Judge Weis), see 829 F.2d at 1243 (App. 34a to 35a), after *Fischer*, denial of a state-of-the-art defense to defendants in asbestos cases, where without exception punitive damages are pleaded and prosecuted, does absolutely nothing to advance administrative convenience. Indeed, this fact was acknowledged by Judge Weis who found *Fischer* "troubling," and conceded that "for all practical purposes what *Beshada* precluded from coming in the front door, *Fischer* allows in the back door. Thus, the goal of simplifying asbestos litigation is eroded by the New Jersey decision to award punitive damages in these cases." 829 F.2d at 1244. App. 35a to 36a.

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20 See discussion *supra* pp. 8-9.

Indeed, "asbestos" plaintiffs in the cases *sub judice* regularly and vigorously resist defendants' attempts to bifurcate or sever the hyper-strict *Beshada* liability issues from conduct-oriented liability issues. That strategy, almost in and of itself, destroys any rationale based on avoiding jury confusion or promoting issue-simplification, and thus highlights the constitutional infirmity of *Beshada/Feldman*. As a matter of practicality, the *Beshada/Feldman/Fischer* trilogy actually fosters jury confusion and makes "asbestos" trials longer and more complicated. Under the present ruling the jury is charged that a defendant is conclusively presumed to know of potential hazards of its product even if those hazards were unknowable at the time of sale or use (*Beshada*) and, in the next breath, is charged that the same defendant must be proved to have actually known and appreciated those hazards and acted intentionally or with reckless disregard toward the plaintiff (*Fischer*). This procedure asks too much of even the most conscientious jury.

The majority pays lip service to the principle that even under the rational relationship test a state law classification is not immune from scrutiny and requires at least one justification for its existence, 829 F.2d at 1251 (Becker, J., concurring). App. 51a to 53a. At the same time, however, Judge Becker declared that the New Jersey Supreme Court could "unwisely" determine and judicially notice legislative facts—presumably without observing the due process procedural safeguards mandated by Federal Rule of Evidence 201, the Constitution, or the New Jersey Rules of Evidence—and as long as the act of judicial notice was related to a legitimate purpose (here, administrative convenience), it would survive equal protection challenge. Judge Becker's opinion ignores the obligation of the federal court to examine what the state has done, and how it has done it, in determining whether fourteenth amendment standards have been met. 829 F.2d at 1245-52 (Becker, J., concurring). App. 37a to 54a.

Absent a facially legitimate articulated rationale, the rulings which prohibit asbestos-product manufacturers from introducing evidence of their lack of actual or constructive knowledge of

their products' potential dangers, but permit the introduction of such evidence by manufacturers of functionally identical products *not* containing asbestos, create a classification which is patently unconstitutional.

III

THE THIRD CIRCUIT'S DE FACTO EXERCISE OF COLLATERAL ESTOPPEL RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

The lead and concurring opinions agree on one common basis for affirming the district court; both find that the New Jersey Supreme Court was entitled to preclude petitioners' evidence by deciding the issue in its own wisdom and without benefit of hearing. However, because the principal grounds on which each opinion rests differ, the majority's holding presents major areas of conflict and leaves the state of the law in disarray. The appropriate application of New Jersey law to thousands of state and federal cases may be controlled by Judge Weis's opinion (which appears to preclude a *Beshada* claim by plaintiff if punitive damages or negligence claims are pressed, 829 F.2d at 1244 (App. 36a));[21] or perhaps by Judge Becker's opinion (which does not preclude a *Beshada* claim under those circumstances).

Should the panel's opinions be permitted to stand, the confusion of the trial courts will persist; if plaintiffs (as inevitably occurs) continue to join conduct-oriented punitive proofs with *Beshada* claims,[22] the slender reed of Judge Weis's opinion

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21 "We cannot overlook the fact that those plaintiffs who wish to avoid the cost of proving the foundation for an uncertain award of punitive damages still may take advantage of the simplified compensation claim *Beshada* makes available." 829 F.2d at 1244. App. 36a. By this statement Judge Weis apparently concedes that all of his rationality hypotheses disappear in the *Fischer* context.

22 Judge Weis is correct. Plaintiffs' reliance on a *Beshada*—only claim is "conspicuous by its rarity." 829 F.2d at 1244. App. 36a.

breaks and the *Beshada* rule either becomes unconstitutional in application for lack of an articulated rational basis, or sustainable only because of Judge Becker's "legislative fact" hypothesis. And if the defendants are sellers (but not manufacturers) of products with asbestos and are not members of the "asbestos industry,"[23] 829 F.2d at 1248 (Becker, J., concurring) (App. 45a to 46a.), there may be a serious question whether *Beshada* will apply under either opinion. Defendants, no less than plaintiffs, have the right to relatively clear and straightforward determinations of liability—particularly when that liability runs into hundreds of millions of dollars.

Thus, serious constitutional questions are presented—some by the district court's rulings; others by the decision of the court of appeals. A dangerous precedent has been established by articulation of a bizarre legal theory, never argued or briefed, and rejected in principle by this Court and directly by the Fifth Circuit. The result denies to defendants a defense that has been accepted by juries throughout the country, including the District of New Jersey. The court of appeals' conflicting, confusing and controversial lead and concurring opinions merit this Court's attention.

IV

THE THIRD CIRCUIT'S FAILURE TO APPLY THE MINIMAL DUE PROCESS REQUIREMENTS OF FEDERAL RULE OF EVIDENCE 201 IS UNCONSTITUTIONAL.

Even if this court believes that the New Jersey Supreme Court consciously sought to judicially notice case-dispositive facts two years after establishing the discriminatory classification of asbestos product manufacturers, and further determines that the classification may constitutionally be predicated upon judicial notice of these facts, this does not end the inquiry. The focus must then shift to an examination of the manner in which judi-

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23 - See *supra* n.9.

cial notice was taken. For if the process was defective, the classification cannot be sustained.[24]

The Federal Rules of Evidence, including Rule 201, apply to *all* actions in the federal courts, including diversity actions. *Hanna v. Plumer*, 380 U.S. 460 (1965); *Gallup v. Caldwell*, 120 F.2d 90, 94 (3d Cir. 1941) "This rule as to judicial notice is not affected by *Erie R.R. v. Thompkins*" (sic). *In re Asbestos Litigation*, 829 F.2d 1233, 1259 n.6 (3d Cir. 1987) (Hunter, J., dissenting). (App. 70a to 71a). On that basis (and because "it is at least arguable that Fed. R. Evid. 201 defines the minimal process due a litigant under the Vth and XIVth amendments"), Judge Hunter correctly concluded that the alleged judicial notice in this case was governed by Rule 201. 829 F.2d at 1259 n.6. App. 70a to 73a. Rule 201 permits judicial notice of adjudicative facts "not subject to reasonable dispute" because they are either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[25]

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24 The opinion below is confusing in many respects and the process of judicial notice relied on by the court of appeals is no exception. Indeed, it is unclear which court—the New Jersey Supreme Court or the Third Circuit—took judicial notice at what time:

—Did the court of appeals take judicial notice under Federal Rule 201 of the New Jersey Supreme Court's judicial notice of the "fact" that, at all relevant times, the harms of their many different products were knowable to all asbestos product manufacturers? or,

—Did the court of appeals take judicial notice of the above "fact" in the first instance, in its effort to find a "legitimate governmental purpose" for the classification? or,

—Did the court of appeals not take judicial notice at all but merely determine the rationality of the New Jersey Supreme Court's decision to judicially notice the "fact"?

Regardless of form, the validity of the notice depends, at the very least, on compliance with certain minimum due process requirements.

25 "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be

The court of appeals, however, sought to circumvent the requirements of Federal Rule 201 by mischaracterizing as "legislative", rather than "adjudicative", the "fact" of defendants' constructive knowledge. There is no rule which deals with judicial notice of legislative facts. Legislative facts are "those which have relevance to legal reasoning and the lawmaking process, whether by formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201 advisory committee's notes.[26] In contrast, adjudicative facts are the facts of the particular case:

> '[F]acts concerning the immediate parties—who did what, where, when, how and with what motive or intent. . . .'
>
> 'Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.'

In re Asbestos Litigation, 829 F.2d 1233, 1257 (Hunter, J., dissenting) (*quoting* 2 Davis, Administrative Law Treatise § 15.03 at 353 (1958)).

Judicial notice of adjudicative facts is appropriate where "particular facts are outside of reasonable controversy . . . A high degree of indisputability is the essential prerequisite." Fed. R. Evid. 201 advisory committee's notes. The facts regarding a

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soundly based and no reason to depart from it is apparent." Fed. R. Evid. 201 advisory committee's notes.

26 Judge Hunter in his dissent below grasped the essential nature of legislative facts:

> [L]egislative facts are those social, economic and philosophical facts upon which we rely to fashion just, appropriate and suitable rules of law. We derive these legislative facts from a common-sense assessment of how modern-day Americans live and view their world. Legislative facts are broad conceptions or beliefs about the interaction of law and society that inform judicial policy-making. 829 F.2d at 1256. App. 64a.

specific asbestos manufacturer's constructive knowledge of the harms associated with its products are adjudicative, not legislative. They are not self-evident, and given the opportunity, petitioners can prove and have proven on many occasions that at least as to some products under some circumstances they did not know and reasonably could not have known of the dangers. Judicial notice of defendants' constructive knowledge is therefore governed by the substantive and procedural requirements of Federal Rule of Evidence 201.[27]

Rule 201 also guarantees parties to a federal action, as a matter of basic procedural fairness, an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Defendant manufacturers have never been given this opportunity in any court at any time.[28]

The New Jersey Supreme Court itself has never expressed an intention to judicially notice the fact of asbestos-product manufacturers' constructive knowledge of the harms associated with their products.[29] Instead, this "fact" appears to have been noticed in an attempt to furnish a legitimate governmental purpose for the challenged classification. Under these circumstances, the failure of the Court of Appeals to comply

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27 Even judicial notice of legislative facts may be subject to the fact-finding process in appropriate circumstances. In *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194, 209-11 (1934), this Court held that the presumption of the existence of facts supporting legislation is rebuttable and, where a classification is challenged as irrational and the asserted basis is predicated upon particular economic facts of a given trade or industry which are "*outside the range of judicial notice*," these facts are properly the subject of evidence and of findings. This Court's concern in *Borden* was that "conclusions shall not be reached without adequate factual support." *Id.*

28 See discussion *supra* Point I.

29 As Judge Hunter noted, this is not surprising "in light of the fact that [the Court] probably did not realize they were taking judicial notice (of either a legislative or an adjudicative fact) until so informed by Judge Becker." 829 F.2d at 1260. App. 73a.

with the procedural and substantive requirements of Rule 201 renders the attempted notice fatally defective.[30]

CONCLUSION

For the foregoing reasons, the writ should be granted.

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30 The concurrence suggests that the court of appeals itself has not taken judicial notice of the fact of asbestos manufacturers' constructive knowledge; rather, the court of appeals simply has fulfilled its assigned task of evaluating the rationality of the state court's action under the equal protection clause. Under Judge Becker's analysis, the court of appeals need only find that because the New Jersey Supreme Court based its discriminatory classification on judicial notice of a legislative fact, the classification, however unwise, is rational. *In re Asbestos Litigation*, 829 F.2d at 1250-51 (Becker, J., concurring). App. 50a to 51a. The irrationality of this position is illustrated by the example described *supra* n.19.